

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
VIVIANA CERVANTES,  
  
Defendant.

No. 1:22-cr-00030-NODJ BAM

ORDER REQUIRING THE GOVERNMENT  
TO RESPOND TO § 2255 MOTION TO  
VACATE, SET ASIDE OR CORRECT  
SENTENCE

(Doc. No. 107)

On August 2, 2023, defendant Viviana Cervantes filed with the court a one-page pro se motion to vacate, set aside or correct her sentence pursuant to 28 U.S.C. § 2255. (Doc. No. 107.)<sup>1</sup> Therein, defendant Cervantes asserts that her conviction on one of the two counts to which she plead guilty and was sentenced – the aggravated identity theft in violation of 18 U.S.C. § 1028A as charged in Count Two of the Superseding Information – should be vacated in light of the Supreme Court’s decision in *Dubin v. United States*, \_\_U.S.\_\_, 143 S. Ct. 1557 (2023). (*Id.*) In that decision, the Supreme Court stated as follows:

A defendant “uses” another person’s means of identification “in relation to” a predicate offense when this use is at the crux of what

<sup>1</sup> It appears that defendant Cervantes has been released from custody and is currently serving her 36-month term of supervised release. (*See* Doc. No. 109.) Defendant’s pending motion would therefore not appear to be moot. However, if defendant Cervantes no longer seeks the relief requested in the still pending motion, she shall file a notice with the court indicating that her § 2255 motion is being withdrawn.

1 makes the conduct criminal. To be clear, being at the crux of the  
 2 criminality requires more than a causal relationship, such as “  
 3 ‘facilitation’” of the offense or being a but-for cause of its “success.”  
 4 *Post*, at 1575, 1576 – 1577 (GORSUCH, J., concurring in judgment).  
 5 Instead, with fraud or deceit crimes like the one in this case, the  
 6 means of identification specifically must be used in a manner that is  
 7 fraudulent or deceptive. Such fraud or deceit going to identity can  
 8 often be succinctly summarized as going to “who” is involved.

9 Here, petitioner’s use of the patient’s name was not at the crux of what  
 10 made the underlying overbilling fraudulent. The crux of the  
 11 healthcare fraud was a misrepresentation about the qualifications of  
 12 petitioner’s employee. The patient’s name was an ancillary feature  
 13 of the billing method employed. The Sixth Circuit’s more colloquial  
 14 formulation is a helpful guide, though like any rule of thumb it will  
 15 have its limits. Here, however, it neatly captures the thrust of the  
 16 analysis, as petitioner’s fraud was in misrepresenting how and when  
 17 services were provided to a patient, not who received the services.

18 \* \* \*

19 Because petitioner did not use the patient’s means of identification  
 20 in relation to a predicate offense within the meaning of §  
 21 1028A(a)(1), the judgment of the Court of Appeals is vacated, and  
 22 the case is remanded for further proceedings consistent with this  
 23 opinion.

24 *Id.* at 1573–74.

25 Recently, the status of the pending motion and the fact that no response to it had been  
 26 filed has come to the court’s attention. Without expressing any view as to whether the § 1028A  
 27 conviction in this case in any way runs afoul of the holding in *Dubin*, the court would be assisted  
 28 by a response to the motion.

Accordingly,

1. The government is directed to file a response to the pending § 2255 motion (Doc. No. 107) within 21 days of the date of this order; and
2. Defendant Cervantes may file a reply to the government’s response within 14 days of the filing of the government’s response.

IT IS SO ORDERED.

Dated: **January 18, 2024**

  
 UNITED STATES DISTRICT JUDGE